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S. N. Verdun-Jones*

Cook, Oliphant, and Yntema:
The Scientific Wing of
American Legal Realism
(Part II)

*The Intellectual Tasks Performed by the Jurisprudence of Cook,
Oliphant, and Yntema*

(i) *The Clarification of Goals*; (ii) *The Invention and Evaluation of
Policy Alternatives*.

Only as men have learned to pay sincere and persistent regard to matter, to the conditions upon which depends negatively and positively the success of all endeavor, have they shown sincere and fruitful respect for ends and purposes. To profess to have an aim and then neglect the means of its execution is self-delusion of the most dangerous sort.¹

Following the lead of John Dewey, Cook, Oliphant, and Yntema pointedly eschewed discussion of ultimate values in terms of their intrinsic "goodness". Their own course of action was to press for the application of scientific method — or Dewey's "method of intelligence" — to the field of ethics. The clear message imparted by their approach was the compelling need for the proponents of particular values to consider the means available for the achievement of their ideals; such consideration, it was argued, would both heighten commitment to goals which were proved to be capable of attainment within a given social context and lead to the rejection of goals which would involve unacceptable social costs in the process of realization. The method to be employed in this intellectual operation was that of modern science; as Cook pointed out.

It is the thesis of the present writer — a thesis developed most fully in the writings of John Dewey — that an application of scientific methods of inquiry to the field of 'values' (ethics and

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1. J. Dewey, *Reconstruction in Philosophy* (Boston: Beacon Press, 1948 ed.) at 72-73

politics, including law) will make our choices of 'ends' "more intelligent, better grounded, less subject to caprice".²

One of the major consequences of maintaining such an approach was that the tasks of goal clarification and policy invention and evaluation fuse imperceptibly into a single intellectual operation; it is therefore proposed to discuss the two tasks within this context of unity.

Perhaps more than any other legal realist, Walter Wheeler Cook was profoundly influenced by John Dewey's pragmatic philosophy; Oliphant and Yntema, for their part, also owed a significant debt to Dewey but the impact of his work upon their jurisprudence was somewhat less marked. In any event, it is necessary to consider the rudiments of Dewey's thinking if the three scholars' approach to problems of value is to be fully comprehended.³

The distinctive feature of Dewey's philosophy is the stubborn insistence that science can furnish the solution to questions of value. In his view, the identical principles of inquiry are applicable to the moral as to the physical dimension of existence. The essence of Dewey's thesis is succinctly presented by Professor John E. Smith:

Value and evaluation for Dewey enter whenever alternative ways of behavior arise; alternatives mean choice and choice involves us at once in distinguishing the better from the worse of proceeding. Dewey hoped, by the projection of worthy goals rooted in nature and human nature, to show that the whole problem of value consists in discovering the best means and materials for realizing the goals we prize Dewey's doctrine of the intimate connection between ends and means was designed to overcome the opposition between the two and to show that ends themselves are somehow subject to the same method of intelligence required for deciding on means and materials.⁴

2. See, Cook's contribution in Kocourek, ed., *My Philosophy of Law* (Boston: Boston Law Book Co., 1941) at 59

3. See, A. Brecht, *Political Theory: The Foundations of Twentieth Century Political Thought* (New Jersey: Princeton Univ. Press, 1959) at 266 ff.; Dewey in Kocourek, ed., *id.* at 73-85; Dewey, *Theory of Valuation* (Int. Encyc. Unified Science, Vol. II, No. 4, Univ. of Chicago Press, 1939) *Passim*; C. W. Mills, *Sociology and Pragmatism* (New York: Galaxy Books, Oxford Univ. Press, 1964) at 279-463; J. W. Murphy, *John Dewey — A Philosophy of Law for Democracy* (1960), 14 *Vanderbilt L. Rev.* 291; E. Patterson, *John Dewey and the Law; Theories of Legal Reasoning and Evaluation* (1950), 36 *A.B.A.J.* 619; J. E. Smith, *The Spirit of American Philosophy* (New York: Oxford Univ. Press, 1963) at ch. IV; J. E. Smith, *Themes in American Philosophy: Purpose, Experience, and Community* (New York: Harper & Row, 1970) at ch. I; M. White, *Social Thought in America* (Boston: Beacon Press, 1957 ed.) at ch. XIII

4. Smith, *The Spirit of American Philosophy*, *id.* at 138-139

Dewey's point of departure is the drawing of a sharp distinction between value-statements based upon mere desire or interest and value-statements based upon genuine "appraisal". In his view, valuation is worthy of note only when it is based on a consideration of both the consequence of and the conditions necessary for the attainment of the values expressed. The value-propositions with which Dewey was concerned were therefore directed towards the definition and description of certain things as "good, fit or proper" in the context of the relationship pertaining between means and ends or means and consequences. Such value-propositions are generalizations because they form "rules for the proper use of materials" and they may be based upon empirical propositions derived from acceptable scientific procedures; in turn, these value-propositions may themselves be submitted to empirical testing by comparing the results actually achieved with those intended.

Dewey went on to argue that it is only within the context of particular problems that valuation has any utility;⁵ when life is running smoothly there is no need for the projection of goals because action flows in the channels of acquired habit. It is only when "there is something the matter" or when there is "trouble" in a concrete situation that it is necessary to investigate the possibility of attaining "better" results in the future and, if this is so, then it is clear that the logic of scientific inquiry — the method of intelligence — must be ceded a crucial place in the process of projecting the goals relevant to the amelioration of the specific problem in question:

. . . valuation takes place only when there is something the matter; when there is some trouble to be done away with, some need, lack, or privation to be made good, some conflict of

5. Although this account is largely based upon Dewey's *Theory of Valuation*, *supra*, note 3, the general thrust of the argument was well known before 1939. See, e.g., the following passage written in 1920:

Moral goods and ends exist only when something has to be done. The fact that something has to be done proves that there are deficiencies, evils in the existent situation. This ill is just the specific ill that it is. It never is an exact duplicate of anything else. Consequently the good of the situation has to be discovered, projected and attained on the basis of the exact defect and trouble to be rectified . . . the primary significance of the unique and morally ultimate character of the concrete situation is to transfer the weight and burden of morality to intelligence. It does not destroy responsibility; it only locates it. A moral situation is one in which judgment and choice are required antecedently to overt action.

See, *supra*, note 1 at 169, 163

tendencies to be resolved by means of changing existing conditions. This fact in turn proves that there is present an intellectual factor — a factor of inquiry — whenever there is valuation, for the end-in-view is formed and projected as that which, if acted upon, will supply the existing need or lack and resolve the existing conflict. It follows from this that the difference in different desires and their correlative ends-in-view depends upon two things. The first is the adequacy with which inquiry into the lacks and conflicts of the existing situation has been carried on. The second is the adequacy of the inquiry into the likelihood that the particular end-in-view which is set up will, if acted upon, actually fill the existing need, satisfy the requirements constituted by what is needed, and do away with conflict by directing activity so as to institute a unified state of affairs.⁶

One major consequence of Dewey's line of reasoning is that value-judgments and judgments about questions of physical fact are neatly assimilated. For Dewey, a value-judgment is not an expression of emotion but a statement about the potentialities or capacities of a particular "end-in-view". In this light, therefore, a value-judgment may be said to amount to an *hypothesis* because it asserts that a particular "end-in-view" will under certain conditions furnish the solution to a specific problem. Just as the physical scientist does not assign objective properties to things without first assuring himself that certain test conditions are satisfied, so the proponent of a particular value-position can not assert that his end-in-view is desirable unless and until he assures himself that it is attainable under conditions which he has thoroughly investigated. Once again, Dewey indicates the indispensability of science in the realm of ethics. As Smith points out:

By connecting value with the meeting of conditions and science with the discovery of conditions, Dewey hoped to show that science is indispensable for the process of evaluation.⁷

We are now in a position to appreciate the reasons why Dewey summarily discounted the notion that there is any intrinsic utility in projecting "ultimate" goals. According to Dewey, any postulated goal must necessarily be appraised in terms of both its empirical consequences and the conditions essential to its realization. Since the conditions of modern society are in a state of constant change, it therefore becomes clear that no goal may be regarded as being

6. Dewey, *Theory of Valuation*, *supra*, note 3 at 34-35

7. Smith, *The Spirit of American Philosophy*, *supra*, note 3 at 142-143

'ultimate' or fixed for all time. On the contrary, our most cherished goals are but tentative hypotheses whose utility can only be determined in the crucible of empirical science and within the confines of concrete problems. Furthermore, Dewey argued that even when we actually achieve a particular end this is only "final" in the sense that a concrete problem has been solved; the end we have accomplished in turn becomes the means to the realization of other ends, as well as a test of valuations previously made. It is in this sense that Dewey schematized the process of valuation as a "continuum of ends-means":

In all the physical sciences (using 'physical' here as a synonym for *nonhuman*) it is now taken for granted that all "effects" are also "causes", or, stated more accurately, that nothing happens which is *final* in the sense that it is not part of an ongoing stream of events. If this principle, with the accompanying discrediting of belief in objects that are ends but not means, is employed in dealing with distinctive human phenomena, it necessarily follows that the distinction between ends and means is temporal and relational. Every condition that has to be brought into existence in order to serve as means is, *in that connection*, an object of desire and an end-in-view, while the end actually reached is a means to future ends as well as a test of valuations previously made. Since the end attained is a condition of further existential occurrences, it must be appraised as a potential obstacle and potential resource. If the notion of some objects as ends-in-themselves were abandoned, not merely in words but in all practical implications, human beings would for the first time in history be in a position to frame ends-in-view and form desires on the basis of empirically grounded propositions of the temporal relations of events to one another.⁸

Nevertheless, it must not be assumed that generalized ideas of ends and values perform no function in Dewey's scheme of valuation. In his view, abstract goals operate as "plans" or "directive means"⁹ which guide our attempts to satisfy the needs in a concrete trouble-situation. In effect, they function as intellectual tools which trigger a consideration of the various strategies which may be adopted to defeat a concrete problem. As Dewey puts it in *Reconstruction in Philosophy*,

Health, wealth, industry, temperance, amiability, courtesy, learning, esthetic capacity, initiative, courage, patience, enterprise, thoroughness and a multitude of other generalized ends are

8. Dewey, *Theory of Valuation*, *supra*, note 3 at 43

9. *Id.* at 44, 53

acknowledged as goods. But the *value* of this systematization is intellectual or analytic. Classifications *suggest* possible traits to be on the look-out for in studying a particular case; they suggest methods of action to be tried in removing the inferred causes of ill. They are tools of insight; their value is in promoting an individualized response in the individual situation.¹⁰

A typical example of Dewey's approach is his treatment of the concept of "health". A doctor has to evaluate alternative strategies of treatment and their foreseeable results upon a particular patient. He formulates his strategies on the basis of what his clinical examination reveals as the "trouble" with that patient. His evaluation of the strategies naturally revolves around their capacity to accomplish a state of affairs in which the "trouble" is eradicated and the patient "restored to health". The doctor is not guided by an abstract goal of health as an ultimate end-in-itself or as an absolute good. In Dewey's own words, the doctor

forms his general idea of health as an end and a good (value) for the patient on the ground of what his techniques of examination have shown to be the troubles from which the patients suffer and the means by which they are overcome. There is no need to deny that a general and abstract conception of health finally develops. But it is the outcome of a great number of definite, empirical inquiries, not on a priori preconditioning standard for carrying on inquiries.¹¹

The impact of Dewey's pragmatic approach upon the jurisprudential writings of Walter Wheeler Cook was singularly profound. From a very early stage in his career, he vigorously rejected the proposition that the process of judicial choice involves exclusive reliance upon judgments of value. In *Scientific Method and the Law*, for example, he contended that "intelligent" decision-making requires not only the clarification of goals but also an empirical investigation of the alternative courses of action open to the decision-maker:¹² without any knowledge of the empirical consequences of proposed action, the decision-maker is completely unable to exercise his powers of choice in a manner which will realize his postulated goals.

At the heart of Cook's approach was an emphatic rejection of the traditionally strict dichotomy supposed to exist between judgments

10. *Supra*, note 1 at 169

11. Dewey, *Theory of Valuation*, *supra*, note 3 at 46

12. W. W. Cook, *Scientific Method and the Law* (1927), 13 A.B. A.J. 303 at 308

of value and statements of fact. Like Dewey, Cook set out to demonstrate that the two intellectual operations are inextricably interwoven. The vehicle for the presentation of his analysis was the 1931 paper — *The Possibilities of Social Study as A Science*.¹³ Although Dewey's works furnished the basic tenets of the paper, Cook's immediate source was C. I. Lewis' *Mind and the World-Order*.¹⁴ Cook contended that a statement of fact has essentially a dual character in that it not only involves a reference to "what now is — the immediately given" but also implies a *prediction* about a "whole series of future actual or possible experiences":

. . . . every statement of fact or descriptive statement is meaningless except in so far as it tells me what I ought to do, how I ought to conduct myself, if I wish to have or to avoid this, that, or the other experience; i.e. produce this, that, or the other consequence or event. If I assert, "this is a fountain pen", I am implicitly asserting "if I wish to write a letter, one way to do so is to conduct myself in the proper way with reference to this round, red and black thing in my hand, etc., etc."¹⁵

The conclusion Cook drew from this analysis was that the judicial decision-maker cannot place his faith in ethics alone; on the contrary, he must also take advantage of all the fruits of empirical social science. Within the context of problem-solving, the former without the latter is equivalent to tilting at windmills.

Cook's final utterance on these issues appeared in the 1941 collection of essays — *My Philosophy of Law* and it is significant that his contribution amounted to an unashamed reformulation of Dewey's *Theory of Valuation* within the context of modern jurisprudence. Cook re-stated Dewey's theory of the ends-means continuum and enthusiastically embraced the philosopher's view that the same logic of inquiry developed in connection with modern physical science can be employed in the construction of a theory of values. Of particular significance for jurisprudential purposes is Cook's endorsement of Dewey's approach towards "ultimate" goals:

13. In *Essays on Research in the Social Sciences* (New York: Brookings Institution, 1931) at 27 ff.

14. C. I. Lewis, *Mind and the World Order; Outline of a Theory of Knowledge* (New York: Dover Publications, 1956 ed.)

15. Cook, "The Possibilities of Social Study as a Science" in *Essays on Research in the Social Sciences* (New York: Brookings Institution, 1931) at 37-38

It needs only slight observation to see that most of us mouth the same 'ultimate ends', 'justice', 'honor', 'happiness', 'goodness' etc., etc. What we tend to ignore is that if we connect these ends "with behavior, behavior with problems, problems with social and historical contexts", we shall see that what is called '*the* ultimate end' is really advanced as a "method of dealing with certain objective needs and lacks in an existing situation". (Sidney Hook, "John Dewey", p. 138). What needs to be done is to examine the existing situation and so to find out what these needs and lacks are. When this has been done, the results of acting upon the supposed 'ultimate end' can be related to the situation which gave rise to the difficulty.¹⁶

The imprint of Dewey's philosophy is equally manifest in Herman Oliphant's discussion of questions relating to values. He too believed that the legal scholar should not preoccupy himself with choosing between remote social ends until an actual problem-situation causes such an end to have practical relevance.¹⁷ In his view, the legal scholar should instead concentrate upon determining the empirical consequences of pursuing particular ends in such a problem-situation.

However, Oliphant diverged from his mentors in that he appeared to relegate the role of the jurist to that of a mere technician concerned with the efficient application of community values:

Fundamental questions as to ultimate social values lie outside the field of the lawyer as such. His work, rather, is to accept such value-judgments as have been made by other agencies whose business is their making and to get up and operate the legal devices or structures best devised to carry out such judgments with the minimum of social friction and best adapted to realize the maximum of each of the conflicting social interests involved in such judgments.¹⁸

Oliphant did not espouse the theory of the ends-means continuum and — unlikely Dewey and Cook — he therefore did not conceive of the jurist's role as being that of an active participant in the postulation of goals. In fact, Oliphant's approach in this regard is much more akin to that adopted by Roscoe Pound whose treatment of the task of policy invention and evaluation was also given in terms of "the minimum of social friction" and the realization of the "maximum of each of the conflicting social interests". For Dewey

16. *Supra*, note 2 at 63

17. H. Oliphant, *Facts, Opinions and Value-Judgments* (1932), 10 Tex. L. Rev. 127 at 136

18. Oliphant, *Current Discussions of Legal Methodology* (1921), 7 A.B.A.J. 241

and Cook, however, the modern jurisprude was a good deal more than a mere "social engineer".

The approach of Hessel Yntema to the twin tasks of goal clarification and policy invention and evaluation was conditioned by his grim determination to divorce the scientific enterprise of jurisprudence from the normative art of the professional lawyers and the judiciary. His concern was to bathe the discipline of jurisprudence with a heavy dose of "cynical acid" flowing from its empirical side and, although he repeatedly recognized the vital importance of ethics to modern jurisprudence, his belief that the traditionalists had squandered their total resources upon the ethical side of their discipline persuaded him to redress the balance by devoting himself to empirical science:

To those who place more faith in facts than fables, it seems a distinct advance, for which we are indebted, among others, to Mr. Justice Holmes, that legal science is slowly being washed "with cynical acid". The superficialities and temptations of legal reformism are subtle and legion. It is some insurance against them that a few seek to attain the perhaps unattainable "aloofness involved in the pursuit of pure science [which] is the condition of that liberality which makes men civilized".¹⁹

It was precisely because Yntema was so determined to establish his position as a "pure" scientist that he studiously avoided any discussion of the two intellectual tasks. Even though he clearly desired that the empirical studies at the Johns Hopkins Institute of Law should yield concrete social reforms, he nevertheless emphatically proclaimed that his task was not to plot the course of such reforms but rather to lay the informational bedrock so vital to the conscientious decision-maker.²⁰ Yntema was perfectly content to ferret out the "facts" and to leave the process of choice to others.

In so far as Yntema had anything to say about the tasks of goal clarification and policy invention and evaluation, it is clear that he was considerably affected by the pervasive current of pragmatism although, in many respects, it was a pragmatism which had been filtered through the jurisprudence of Roscoe Pound rather than springing directly from John Dewey himself. Perhaps the core of

19. Yntema, *The Rational Basis of Legal Science* (1931), 31 Colum. L. Rev. 924 at 935-936

20. An example of Yntema's determination to avoid personal choice may be gleaned from his foreword to *Analysis of Ohio Municipal Court Acts* (1930) [draft manuscript] in which he specifically rejects the task of making policy recommendations.

Yntema's approach is most succinctly revealed in a passage in which Yntema retrospectively discusses the main features of legal realist thinking; in his view, a basic premise of the realist movement was

. . . the conception of law as a means to certain ends, an applied science. This imported, on the one hand, consideration of the ends to be subserved by the legal order, or in other words the policies and values that it connotes, and on the other hand, examination of its technical efficiency and more especially its effects.²¹

In articulating this premise, Yntema was perhaps reflecting his own personal concern with improving the "technical efficiency" of law and with mapping its "human effects":²² both such concerns were crucial to the pragmatic philosophy of law. Again it is through Yntema's description of another man's work that we may glimpse his basic concept of "justice". In 1941, he wrote of E.N. Garlan's analysis of realistic theories of justice,

. . . . justice is the perennial quest for improvement in law, functioning as a symbol to represent the need of constant criticism and constant adaptation of law to the changing society it articulates. It expresses the eternal motive of legal reform, "the insistence that law is the means to ends, making achievement, realization, preservation, and constant criticism always relevant to judgment". In sum, justice is defined less by the ideals that may be sought than by the search for better law.²³

There is no doubt that Yntema assented to the basic proposition implicit in Garlan's definition of justice.

It has been necessary to concentrate upon the philosophy of pragmatism because its basic tenets constitute the very essence of American legal philosophy in the pre-second world war years of the twentieth century. In our own time, it is no doubt a simple task to reveal fundamental flaws in the approach as a comprehensive philosophy for modern man. For example, it is clear that Dewey's theory of the ends-means continuum does not satisfactorily dispose of the need for decision-makers to choose between competing goals on the basis of a non-scientific judgment. Indeed, the logic of

21. Yntema, *American Legal Realism in Retrospect* (1960), 14 Vand. L. Rev. 317 at 323

22. See, e.g., *Bulletin Number Five of the study of Judicial Administration in Ohio: State-wide Studies in Judicial Administration — A Report of Progress* (Baltimore: Johns Hopkins Univ., June 1931) at 2

23. Yntema, *Jurisprudence on Parade* (1941), 39 Mich. L. Rev. 1154 at 1169. The work by Garlan was *Legal Realism and Justice* (New York: Columbia Univ. Press, 1941)

scientific inquiry can only *defer* such a choice — it cannot eliminate it. As Arnold Brecht puts it,

If I have found out that a certain action will impair my health, but add to my wealth, or that it will impair both, but be useful to my child, my friend, my country, or to humanity, I have still to choose according to which value I *do* consider higher, and/or which I *ought* to consider higher. When a general at war is faced with a situation in which an attack he contemplates will save the lives of a number of his soldiers but destroy a venerable monument like Monte Cassino in Italy, he must, after all the consequences are clear to him, still decide which is the higher value. Even if he knows what is more valuable to *him* — he may not care for cultural values but may care deeply about his soldiers, or he may be a fanatic lover of cultural values but callous as to lives — the question remains whether he *ought* to prefer something different from what he does prefer, and no argument of Dewey's relieves him or his superiors of this responsibility. When all the information science can produce regarding the consequences of our acts is in, and let us assume that it is actually perfect and complete, there still remain those two different questions: What, in view of the consequences, do I desire? and, how ought I to act irrespective of my own desires? . . . The answer to the latter question, unless looked for in revealed commandments of the deity or in orders given by earthly authorities, depends on a human decision, a choice among competing ideas.²⁴

This particular weakness of the pragmatic philosophy was perhaps not very noticeable in an age where fascism had not yet cast its shadow over Europe and where the instruments of modern

24. Brecht, *Political Theory*, *supra*, note 3 at 268-9. For a detailed criticism of Dewey's assimilation of fact — statements and value-judgments and a vigorous rejection of the notion that scientific statements can impose "obligations", see White, *Social Thought in America*, *supra*, note 3 at 214 ff.

John E. Smith probes a further weakness of Dewey's pragmatism when he argues that it is only in the most simple of social situations that the problematic nature of the case can be ascertained on the basis of a factual analysis alone. A linchpin of Dewey's thesis was that values only become relevant when a "problem" becomes apparent. However, Smith points out that many crucial choices are precipitated by conflict between such values as "personal honesty" and "worldly success". He continues

In these cases the "problem" does not announce itself as it does when a physical system goes out of order; instead we require a standard of excellence by reference to which we can say that the situation is not as it ought to be. It is curious that the closer we come to situations which would normally be regarded as "moral" situations, the more difficult it is to see that their problematic character can be discovered merely by scientific analysis.

The Spirit of American Philosophy, *supra*, note 3 at 149

technology had not yet been put to grossly perverted uses. The upheavals of the second world war demonstrated the inadequacy of such a morally shallow philosophy and the criticism that pragmatism was oriented towards "progress without a goal" began to ring true.

In so far as the majority of American legal realists accepted pragmatism's rejection of ultimate values, they too earned themselves a torrent of virulent and unremitting criticism.²⁵ Significantly, those who survived the war years subsequently adopted a different position.²⁶ Nevertheless, it would be a gross mistake to assume that this defeat illustrates a basic irresponsibility on the part of the realists; indeed, nothing could be further from the truth.

Stripped of its apocalyptic rhetoric, the realist message was in essence a plea for judicial responsibility. Holmes, Pound, and Cardozo had convincingly demonstrated that judicial decision-making was a process of *choice* and their jurisprudential writings had echoed pragmatism's emphasis upon the consequences of choice as the basis for evaluation. After their onslaught, it was no longer possible to assert that decisions were made on the basis of logical derivation from a hierarchy of authoritative rules and principles. Indeed, it was soon realized that the path to progress lay in informed and purposive decision-making. Dewey himself pointed out:

. . . the ultimate fate is the fatality of ignorance, and the ultimate wickedness is lack of faith in the possibilities of intelligence applied intuitively and constructively.²⁷

Realists, such as Cook, Yntema and Oliphant conceived it to be their mission to translate the ideal of responsible decision-making into concrete reality. In attempting to harness scientific method to

25. See, e.g., W. B. Kennedy, *Realism, What Next* (1938), 7 Fordham L. Rev. 203; W. B. Kennedy, *A Review of Legal Realism* (1940), 9 Fordham L. Rev. 362. In *Contemporary Juristic Theory* (Claremont Colleges, 1940) Roscoe Pound went so far as to claim that realism leads to political absolutism.

26. See, e.g., *supra*, note 21 at 329

. . . (realism) came to prepare the way for the more adequate humanistic legal science that we hope may succeed. It would be improper to hold legal realism ultimately accountable for its limitations, if only since it had no time to outgrow its childhood.

The switch in position of realists such as Frank and Llewellyn is documented by E. A. Purcell in *American Jurisprudence between the wars: Legal Realism and the crisis of Democratic Theory*, (1969-70), 75 American Hist. Rev. 424 at 434-444

27. Quoted in Mills, *Sociology and Pragmatism*, *supra*, note 3 at 405

modern jurisprudence, they smashed the intellectual barriers between ethics and science — demonstrating how goals may be clarified in terms of their predicted consequences and how decisions must be made in terms of the net social consequences of proposed alternative courses of action: these were barriers that would never be erected again.

Unfortunately, having indicated the place that scientific thinking may take in responsible decision-making, Cook, Oliphant, and Yntema and other realists abdicated responsibility for the postulation of ultimate goals; clearly, the assumption of such a responsibility is essential to a proper performance of the two intellectual tasks at issue. Nevertheless, it is not too difficult to discover some of the historical factors which may have influenced their position. For example, the realists may be forgiven for their suspicion of abstract ideals when the Supreme Court was mouthing nebulous generalities as a technique for justifying the obstruction of social change. After all, that masterpiece of obfuscation — the liberty of contract doctrine enunciated in *Allgeyer v. Louisiana* was still being quoted with approval until the early thirties.²⁸ No doubt the realists felt that such ultimates were merely a euphonious facade which covered up irresponsible decision-making.

(iii) *The Analysis of Past Trends in Decision*

In making our observations we shall . . . find it necessary to focus our attention primarily upon what courts have *done*, rather than upon the description they have given of the reasons for their action. Whatever generalizations we reach will therefore purport to be first of all an attempt to describe in as simple a way as possible the concrete judicial phenomena observed, and their 'validity' will be measured by their effectiveness in accomplishing that purpose.²⁹

28. *Allgeyer v. Louisiana* (1897), 165 U.S. 578. The dictum (which was frequently cited with approval until the court's change of heart in *Nebbia v. New York* (1934), 291 U.S. 502) ran as follows:

The liberty mentioned in (the 14th) amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the rights of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.

29. Cook, *The Logical and Legal Bases of the Conflict of Laws* (Cambridge, Mass.: Harvard Univ. Press, 1943) at 8

It may be recalled from our analysis of the balance of emphasis between operations and perspectives in the jurisprudence of Cook, Oliphant, and Yntema that a central theme in their work was the need to construct generalizations which adequately reflect the actual behaviour of the courts. To this end, one of their major goals was to cut themselves loose from the ambiguities of judicial language and to develop a technique of classifying judicial decisions in terms of their factual context and in relation to the social and economic policies which shaped the judges' ultimate choice.

As we have seen, Cook's initial efforts to trace the flow of past decisions were based upon the analytical jurisprudence of Wesley Newcomb Hohfeld.³⁰ The main thrust of Hohfeld's approach was the need to avoid ambiguity in judicial language. Hohfeld convincingly demonstrated that trends in decision-making became infinitely more discernible when it is recognized that the courts habitually employ the same legal terminology to represent fundamentally dissimilar conceptions.³¹ Of course, Hohfeld's alpine analysis of judicial decisions was based solely upon eight legalistic categories and can only be viewed as a prolegomenon to a more systematic description of past trends. However, its place in the development of the approach of many legal realists to the classification of judicial decisions should not be underestimated.

Cook expanded the basic Hohfeldian approach to include not only a razor-sharp analysis of language but also a consideration of the social, political, and economic context within which judicial decisions are located. Significantly he applied his technique of analysis to perhaps the most conceptualistic of all legal studies — the conflict of Laws. Typical of his approach is his blistering criticism of the Restatement for its acceptance of the notion that there is a single conception of domicile.³² Cook demonstrated that the meaning given to the legal concept of domicile varies according to the nature of the specific problem presented to the court and that trends in decision-making cannot be understood without an appreciation of the factual context within which the term has been used:

30. See, e.g., *The Alienability of Choses in Action* (1916), 29 Harv. L. Rev. 816 and (1917), 30 Harv. L. Rev. 449; *The Utility of Jurisprudence in the Solution of Legal Problems in Lectures on Legal Topics* (New York: Macmillan's Co., 1928)

31. W. N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, ed. W. W. Cook (New Haven: Yale University Press, 1963 ed.)

32. *Supra*, note 29 at ch. VII

. . . . if we were to place in one group all the cases of, say, 'domicil' as giving jurisdiction to divorce, and in another those involving some other purpose, say taxation or intestate succession, a comparison of these groups would show that as we reach the doubtful cases, the verbal symbol 'domicil' has not been given precisely the same meaning: the judges have been influenced by the particular problem before them, and in fact, though more often not explicitly, were deciding that the person in question was or was not domiciled in a particular place for the purpose then under consideration.

This, it seems to me, is quite as it should be: any other result would mean that our judges were failing to take account of the social and economic problems presented for adjudication.³³

One of the most celebrated expositions of Cook's methodology was his article, '*Substance*' and '*Procedure*' in the conflict of Laws (1933).³⁴ In this paper, Cook convincingly demonstrated how the analyst of trends in judicial decision-making must pierce the veil of language and classify past decisions in terms of those fact-situations to which similar policy considerations are applicable. In relation to the distinction between procedure and substance in the conflict of laws, Cook disdainfully dismissed the whimsical notion that there exists an objective line between the two categories and that the function of a court is to find out 'on which side of the line a set of facts falls'. Cook pointed out that the distinction between substance and procedure is made for widely differing purposes; hence the perceptive analyst is aware that what the courts hold 'procedural' for one purpose may equally well be treated as 'substantive' for another. In other words, there is a kind of "no-man's land" between the two opposing categories and whether a court allocates a case to one or the other depends upon its conception of the particular social or economic policy to be furthered by making the classification.

The consequence of this argument is that jurists and courts must be extremely wary of employing decisions, in which a classification has been made for one particular purpose, as precedents for cases in which a classification must be made in relation to an entirely different set of circumstances. Cook argued that in fact the courts are well aware of this danger and apply his method of analysis — if not in theory — at least in their daily practice. However, he went

33. *Id.* at 196-197

34. (1933), 42 Yale L. J. 333, reprinted in *The Logical and Legal Bases of the Conflict of Laws*, *supra*, note 29 at ch. VI

on to suggest that the maintenance of a jurisprudential theory which states that the courts search for a pre-existing meaning of such terms as 'substance' and 'procedure' can sometimes lead even the greatest of judges astray:

. . . . But-and this is the important thing — inadequate theory leads sooner or later to unfortunate decisions, as is shown by the result reached by an intelligent judge like Cardozo in the case of the hydroaeroplane. A recognition by all judges that they are not seeking the pre-existing meaning of the words 'procedure' and 'substance' would, it is believed, lead not to a revolution in judicial decisions but to fewer bad ones, i.e., 'bad' in the sense of not carrying out the social or economic policy underlying the rule which is being applied.³⁵

No doubt, Cook's method is regarded by the modern critic as being axiomatic and in no way worthy of the publication of a complete volume of essays dedicated to its promulgation. Nevertheless, in its own historical context, it is surely a vital starting point for modern jurisprudence's performance of the task of trend analysis.

A curious question in the history of American legal realism is why Walter Wheeler Cook achieved so little of substance. His volume on the conflict of laws consists mainly of an excursion into the realms of method and he frankly disavowed any intention of writing a systematic survey of the area. For example, his discussion of the concept of domicile contains a statement of intention which reveals much:

The foregoing discussion of the theory that the word 'domicil' has one and only one meaning for all purposes is obviously

35. *Supra*, note 29 at 186. This passage was added in 1942. The case referred to is *Reinhardt v. Newport Flying Service* (1921), 232 N.Y. 115; 133 N.E. 371. Cook's comments on the case were as follows:

In that case an employee was struck by the propeller of a 'hydroaeroplane' while it was moving on navigable waters. It was held that since the plane was a vessel "while afloat upon waters capable of navigation" and so "subject to the admiralty" jurisdiction, the State Workmen's Compensation Act did not apply. In his opinion Cardozo, J. apparently assumes that there is a single definition of 'vessel' for all purposes of the admiralty law, and thus by a process of what may fairly be called 'mechanical jurisprudence' reaches his conclusion. Should we not ask, is a hydroaeroplane even when on a navigable water the kind of structure covered by the policy of the rule laid down in *Knickerbocker Ice Co. v. Steward*? Surely we do not need to conclude that because in a collision case the hydroaeroplane on the water ought perhaps to be held to be a 'vessel' within the meaning of a marine insurance policy or to give a lien, it is therefore a vessel in the sense that one of the 'crew' who 'navigate' it while temporarily on the water can maintain a libel *in rem*? This would indeed be a 'jurisprudence of conceptions'.

incomplete. It is intended, like all the other parts of this book, to be suggestive rather than exhaustive: suggestive, that is, in the way of indicating modes of analysis likely to yield results more accurate as descriptions of judicial behavior and at the same time more helpful in the consideration of new problems.³⁶

In line with this policy, Cook dealt with substantive topics in the conflict of laws solely on the basis of illustrating the application of his jurisprudential method to selected lines of cases; he never attempted a systematic analysis of the trends in decision-making in this area.

A possible explanation for Cook's actions may be sought in the historical context within which he was writing about the conflict of laws. The first thirty years of the twentieth century witnessed the zenith of the vested rights theory with its emphasis upon a territorialist conception of law. The theory had been accepted by the Supreme Court in 1904³⁷ and was later popularized by the jurist, Joseph Beale.³⁸ Cook regarded the theory with the utmost intellectual contempt and he devoted his energies to its destruction — a battle which he won convincingly.³⁹ As a result of Cook's endeavors it became clear that the function of the conflict of laws is the carrying out of *local* law and policy. However, in attacking the vested rights theory and pursuing it to its death, Cook utilized the bulk of his energies in what was essentially a destructive exercise. As Brainard Currie comments (with special reference to Cook),

The territorialist conception of law has been directly responsible for indefensible results and, what is perhaps worse, has therefore driven some of our ablest scholars to consume their energies in purely defensive action against it.⁴⁰

Cook himself regarded his achievement as being the removal of "rank weeds" from the "intellectual garden" and argued that such

36. *Supra*, note 29 at 203

37. *Slater v. Mexican National Railway* (1904), 194 U.S. 120

38. Joseph Henry Beale — *A Treatise on the Conflict of Laws* (New York: Baker, Voorhis and Co., 1935); *A Shorter Selection of Cases on the Conflict of Laws* (Cambridge, Mass.: Harvard Law Review Publishing Association, 1907); *Conflict of Laws: or Private International Law* (Cambridge, Mass.: Harvard Law Review Publishing Association, 1916); *The Jurisdiction of Courts over Foreigners* (1913), 26 Harv. L. Rev. 283

39. Currie argues that Cook destroyed the theory "as thoroughly as the intellect of one man can ever discredit the intellectual product of another." See, Brainard Currie, *Selected Essays on the Conflict of Laws* (Durham, N.C.: Duke Univ. Press, 1963) at 6

40. *Id.* at 180. See also, D. F. Cavers, *A Critique of the Choice-of-Law Problem* (1933), 47 Harv. L. Rev. 173

weeds had to be removed before useful plants could grow and flourish. In this sense, he suggested that the "removal of the weeds is . . . as constructive in effect as the planting and cultivation of the useful vegetables".⁴¹ Pursuing this horticultural metaphor even further, Yntema suggested that Cook, instead of eliminating the weeds, should have reduced the whole garden to ashes, from which a phoenix might later have arisen.⁴²

In any event, Cook's contribution to this field of jurisprudence was clearly methodological rather than substantive. No doubt, the technique of trend analysis that he proposed is now taken as being axiomatic and the question today is one of developing specific methods of classifying decisions according to the social, economic, and political problems which they present to the courts; nevertheless, it was at least a new point of departure for jurisprudential analysis.

Yntema's approach to the task of trend analysis was remarkably similar to that maintained by Cook. Curiously enough, he also followed in his colleague's footsteps by devoting much of his attention to the conflict of laws. In his early article, *The Hornbook Method and the Conflict of Laws* (1927), Yntema stressed that the classification of past trends in the form of "rules" is at best a tentative exercise and that the purpose and factual context of the classification must be constantly borne in mind:

It should be obvious that when we have observed a recurrent phenomenon in the decision of cases by the courts, we may appropriately express the classification thus adopted in a rule. But the rule will be only a mnemonic device, a useful but hollow diagram of what has been. It will be intelligible only if we relive again the experience of the classifier and will be safely employed only with knowledge of its limited purpose and of the scientific deficiencies of the decisions from which it is abstracted.⁴³

Like Cook, Yntema was not bound by the confines of judicial language in his description of trends in decision-making and his major concern was to identify the differing policies enshrined in the various decision-outcomes. However, his work went far beyond the preliminary skirmishings of Cook and he made a serious attempt to describe trends in decision across national boundaries. Indeed,

41. *Supra*, note 29 at ix

42. Yntema, *The Historic Bases of Private International Law* (1953), 2 J. Am. Comp. L. 297

43. *The Hornbook Method and the Conflict of Laws* (1927-28), 37 Yale L. J. 468 at 481

during the years following the second world war, Yntema launched a crusade to develop the study of comparative law within the United States and his stern commitment to this goal is evidenced by his role in the establishment of the American Journal of Comparative Law.⁴⁴

Significantly, Yntema regarded the failure of legal realism to undertake research on a comparative basis as one of its most serious shortcomings. In 1961, he wrote

. . . . the next step in jurisprudence must be, not to abandon the critical achievements of legal realism, but also to develop on more constructive lines, including particularly those that realism tended to ignore. This would necessarily involve a humanistic conception of legal science with due attention to systematic analysis of legal theory and to historical and comparative legal research.⁴⁵

Nevertheless, it must be admitted that Yntema's own performance of the task of trend analysis during the realist era was not in any way systematic. For example, his article, *The Enforcement of Foreign Judgments in Anglo-American Law* (1933)⁴⁶ did little more than compare American case law with recent statutory innovations in Great Britain and the discussion of the policies pursued by the courts is — at best — extremely sketchy. In marked contrast, a post-war paper such as “*Autonomy*” in *Choice of Law* (1952)⁴⁷ represents a systematic trend analysis of legislative and judicial decision-making in a wide cross-section of the world's legal systems and also relates such decisions to the underlying goals and objectives of these systems.

Like his two colleagues, Oliphant placed considerable emphasis upon the need for a radically different approach towards the task of trend analysis. As we have seen, he intended that judicial decisions must be classified in terms of what the courts have done rather than in terms of what they have said:

Not the judge's opinions, but which way they decide cases, will be the dominant subject-matter of any truly scientific study of

44. See, Yntema, *The American Journal of Comparative Law* (1952), 1 Am. J. of Comp. L. 11

45. *Supra*, note 21 at 330. For Yntema's concern with the development of Comparative Legal Studies, see, *Comparative Legal Research — Some Remarks on Looking out of the Cave* (1956), 54 Mich. L. Rev. 899; *Comparative Legal Studies and the Mission of the American Law School* (1957), 17 La. L. Rev. 538; *Comparative Law and Humanism* (1958), 7 Am. J. of Comp. L. 493

46. (1935), 33 Mich. L. Rev. 1129

47. (1952), 1 Am. Jo. of Comp. L. 341

law. This is the field for scholarly work worthy of best talents, for the work to be done is not the study of vague and shifting rationalizations but the study of such tough things as the accumulated wisdom of men taught by immediate experiences in contemporary life — the battered experiences of judges among brutal facts.⁴⁸

Oliphant illustrated his thesis by comparing two lines of old decisions dealing with the validity of promises not to compete. In Oliphant's view, traditional jurisprudence regarded them as being in hopeless conflict. However, when the factual background of the decisions was delved into it became clear that all the cases where the promises were declared to be invalid concerned the situation where an employee had promised his employer not to compete with him after leaving his service. On the other hand, all the cases where the promises were declared to be valid concerned the situation where the vendors of a business bound themselves not to compete with the purchasers. By examining the factual context of the decisions, Oliphant was able to demonstrate judicial consistency in what appeared — from the doctrinal point of view — to be a totally unpredictable area of the law. Furthermore, Oliphant contended that the different outcome in each line of cases was salutary in the light of economic and social policy.⁴⁹

With the hindsight of half a century, one may well be forgiven for regarding Oliphant's discussion of these cases with some degree of surprise. The thesis is pitched at a markedly less sophisticated level than that propounded by Cook or Yntema and it is difficult to imagine that even the most formalistic of legal scholars would have attempted to gainsay it.⁵⁰ Curiously, Oliphant suggested that the

48. Oliphant, *A Return to Stare Decisis* (1928), 6 Am. L. Sch. Rev. 215 at 225

49. *Id.* at 226

50. Writing in 1953, Patterson said in *Jurisprudence: Men and Ideas of the Law* (Brooklyn: Foundation Press, 1953) at 311, 314

The technique thus exemplified is now fairly common in the writings of American Legal Scholars, in law teaching, and, to a lesser extent, in the reported opinions of courts The fact-decision technique of construing precedents is, I believe, recognised and used by American courts.

Cook and Yntema did not propound their theories at such a crude level. They were more concerned with contextual approaches to the problem of "meaning" in law. They did not assume that courts and scholars were unaware of fact distinctions in the classification of past decisions for use as guides to contemporary decision-makers. On the contrary, they argued that categorization according to factual context rather than doctrine was in fact the prevailing technique employed by the judiciary. For Cook and Yntema, the problem was that the technique was not openly acknowledged and decisions were clothed in opaque doctrinal garments.

courts make the vital distinctions between differing factual situations on a purely intuitive basis. In relation to the distinction drawn in the cases involving promises not to compete, he said:

This distinction between these two lines of cases is not even hinted at in any of the opinions but the court's (sic) intuition of experience led them to follow it with amazing sureness and the law resulting fitted life. That is a sample of the stuff capable of scientific study.⁵¹

Perhaps Oliphant's most significant contribution to the enhancement of techniques of trend analysis was his critical role in the field of legal education.⁵² Oliphant was a prime mover in the debates on curricular reform at Columbia Law School during the 1920s and a major plank in his own program was the re-arrangement of the law curriculum so that decisions on functionally related problems could be grouped together for teaching purposes:

. . . . if we are really to get at the fundamentals, the organisation of the curriculum must be more in terms of the human relations dealt with and less, as largely now, in terms of the present legal concepts of the conventionally trained legal mind.⁵³

In 1922, Oliphant pioneered a course on trade regulation at Columbia and, in the following year, he published his *Cases on Trade Regulation*⁵⁴ — a book which gathered together decisions from many of the basic courses at the law schools of the day and related them to concrete problems in the everyday regulation of business. Following his success in bursting through the traditional legal classifications, he applied himself with gusto to the formulation of a grand plan for the re-organization of the whole law school curriculum. His final view appears to have been that the syllabus should be divided, into three basic functional categories — family; business; and political relations. These categories would then be further subdivided: for example, business relations would be

Their concern was to persuade decision-makers to reveal the "true" bases of their choices and thus render the decisions more responsible. Furthermore, they believed that failure to remember that meaning shifts with context *occasionally* made the judiciary themselves unaware of the true nature of the problems involved in a case and the policies applicable to it. Oliphant seemed to assume that both courts and jurists were totally unaware of these considerations — a proposition which is, with due respect, somewhat naive.

51. *Supra*, note 48 at 226

52. See generally, B. Currie, *The Materials of Law Study* (Part III) (1955), 8 J. Legal Ed. 1

53. *The Future of Legal Education* (1929), 6 Am. L. Sch. Rev. 329 at 332

54. See, Currie, *supra*, note 52 at 3-6

split into the categories of business units, labor relations, marketing, financing, risk and risk-bearing while political relations would be grouped around the three divisions of law administration, criminal law plus criminology, and public law.⁵⁵

This ambitious project failed for many reasons but Oliphant's contribution to the area of trade regulation has been regarded as seminal and the manner in which he re-organized traditional case and statutory materials in terms of economic and social problems has exercised a considerable effect on the development of modern techniques of trend analysis. Tragically, Oliphant may be said to have followed in Cook's footsteps in so far as he developed a novel technique of trend analysis but then failed to apply it in any systematic survey of decisions. During his career at Columbia, Oliphant was involved in the task of promulgating the goals of the curricular re-organization movement and consequently devoted little time to substantive work. In 1925, he published the first part of an article on *Mutuality of Obligation in Bilateral Contracts at Law*, the sequel to which appeared in 1928.⁵⁶ These articles were based "on logic, on the analysis of precedents, and on strictly "arm-chair" evaluation of the practical considerations";⁵⁷ they contained no analysis of decisions in terms of social and economic policy and, in this respect, they were a curious product to fall from the pen of an ardent legal realist. In 1926, he published a brief paper entitled *Trade Associations and the Law*⁵⁸ and here at least —

55. *Supra*, note 53 at 332 ff. See also Oliphant, ed., *Summary of Studies in Legal Education by the Faculty of Law of Columbia University* (1928) *passim*.

56. (1925), 25 Colum. L. Rev. 705 and (1928), 28 Colum. L. Rev. 997. The manner in which Oliphant almost retreats to the very mode of analysis which he previously criticized so vigorously is illustrated by his outline of the relevant issues:

1. Is there some well established "principle" in the law of contracts from which the supposed general rule, that both parties must be bound, follows as a matter of logical necessity?
2. Are there "logical" arguments opposed to the supposed rule?
3. Are there cases in the books which involve and, hence, pass upon this question, in addition to the cases already referred to and commonly thought to be exceptions to the supposed rule? What have been the opinions of judges and text-book writers on this question?
4. As a matter of practical convenience how does the matter stand? Is such a rule necessary or unnecessary to avoid injustice or is the question neutral in its practical aspects?

25 Colum. L. Rev. 707.

57. *Supra*, note 52 at 77n

58. (1926), 26 Colum. L. Rev. 381. For some reason, Currie ignores this article.

Oliphant did attempt to discuss decisions in the light of policy considerations but the analysis was based upon a minute sample of four Supreme Court cases.⁵⁹ In 1927, Oliphant delivered his famous presidential address to the Association of American Law Schools — *A Return to Stare Decisis*⁶⁰ in which he outlined his stimulus-response theory of judicial decision-making and advocated closer analysis of the factual context of decisions; this work, however, was purely methodological and contained no substantive analysis. In sum, Oliphant developed the tools for an adequate performance of the task of trend analysis but he failed to employ them in any substantive venture; as Brainerd Currie has remarked,

Oliphant compiled a pioneering casebook which required the addition to the curriculum of a new course, based on a novel grouping of materials; the novel course is now standard in almost every law school. If he had devoted his energies to the improvement of that book and to the construction of others, instead of building fires in the camps of his colleagues, he might have been remembered, like Langdell, as the founder of a new era in legal education rather than as the leader of a movement which foundered.⁶¹

One final comment in relation to the task of trend analysis is that Cook, Oliphant, and Yntema all concentrated upon the decisions of appellate tribunals when they attempted to trace the flow of judicial decisions. As Jerome Frank pointed out in strident tones,⁶² the appellate arena is but a small part of the process of authoritative decision-making and for this reason it is imperative that the analyst of past trends in decision-making should cast his net over the whole range of tribunals operating in any given system.

59. An example of the level of analysis is contained in the following concluding passage:

On such ponderous social questions as marked changes in the form of the whole industrial structure, society seldom formulates a conscious policy: it plunges into change by revolution or slowly drifts into change when it moves at all. If we could now plot the whole of the curve which is defined by the day to day decisions of our courts concerning competition and only a bit of which we can now see, we could probably predict developments infinitely more momentous than all these thousand trade associations, which after all, are doubtless but a passing phase of our commercial evolution.

Id. at 395

60. (1928), 6 Am. L. Sch. Rev. 215

61. *Supra*, note 52 at 77

62. See, e.g., Frank, *Modern and Ancient Legal Pragmatism* — John Dewey & Co. v. Aristotle (1950), 25 Notre Dame Lawyer 207 at 255

(iv) *The Scientific Task: The Analysis of Factors Conditioning Decision*

In law we cannot institute suits to test judicial behavior; as the physicists make experiments to test the behavior of matter. But each case is a record of judicial behavior.⁶³

Surprisingly, Cook and Yntema manifested no interest in the construction of even the most rudimentary conceptual model of the decision-making process. In a manner which set them distinctly apart from their colleagues in the realist movement, they blithely ignored both the institutional and the psychological factors which may be said to condition judicial decision-making.

The one dimension of the decision-making process which did concern Cook and Yntema was the question of the impact of legal rules upon the ultimate disposition of cases. As we have seen, Cook and Yntema confined their attention to the appellate arena and it is within this rarefied context that their analysis of the impact of rules upon decision-making must be considered. In their view, the appellate case load may be said to consist mainly of 'new' cases in which the "facts" diverge significantly from previous problem-situations dealt with by the courts. Legal rules cannot determine the outcome of such 'new' cases because they are themselves only tentative classifications of past judicial decisions and thus the critical factor in shaping the final result must be the judges' conception of the economic or social policy which ought to be applied. The appellate court often talks of "applying" a legal rule in such circumstances; however, in Cook's view, such a statement is fundamentally inaccurate because what the court has really done is to *extend* the class of cases subsumed under a legal rule so as to include the particular case in hand. As Cook puts it in *The Logical and Legal Bases of the Conflict of Laws*,

The actual process involved in settling a situation of doubt — a 'new' case, if we are dealing with law — involves a comparison of the data of the new situation with the facts of a large number of prior situations which have been subsumed under a 'rule' or 'principle' within the terms of which it is thought the new situation may be brought. This comparison, if carried on intelligently, necessarily involves a consideration of the policy involved in the prior decisions and of the effects which those decisions have produced. If the points in which the new situation resembles the older situations already dealt with are thought to be

63. *Supra*, note 48 at 229

the qualities the existence of which were decisive in leading to the decisions in the prior cases, the new case will be put under the old rule or principle. In doing this, the rule or principle as it existed has not been merely 'applied'; it has been extended to take in the new situation the danger in continuing to deceive ourselves into believing that we are merely 'applying' the old rule or principle to 'a new case' by purely deductive reasoning lies in the fact that as the real thought process is thus observed, we fail to realize that our choice is really being guided by considerations of social and economic policy or ethics, and so fail to take into consideration all the relevant facts of life required for a wise decision.⁶⁴

By way of contrast, Cook and Yntema appear to have believed that most cases which are presented at trial court level are generally of a routine nature and are decided on the basis of "habit" rather than reflective thought.⁶⁵ In such cases, the trial judge recognizes that the "facts" presented are so similar to those manifested in a group of previous decisions that he automatically arrives at the same final result. In such circumstances, the judge may be said to have applied a legal rule in that he has declared a particular fact — situation to be within a pre-existing class of phenomena for which a specific outcome is deemed to be appropriate.

It is indeed curious that these two self professed devotees of scientific method should have identified what they believed to be the decisive factors in the appellate decision-making process without attempting either to clarify their nature in conceptual terms or to clothe them with any form of empirical garb. Clearly, the individual personality of the appellate judge affects both his perception of the facts frozen in the case-record and his determination as to which is the appropriate economic or social policy to apply to them; yet Cook and Yntema were content to leave these critical factors lurking behind the blanket assertion that "policy" determines the outcome of appellate decision-making. If Cook and Yntema felt squeamish about pursuing the type of subjective individual psychology which aroused the interest of

64. *Supra*, note 29 at 43-45

65. See, *id.* at 182-3 n:

. . . . many of the cases which present themselves to a trial judge are so much like other cases already passed upon that they are disposed of in a more or less routine way without much thought . . . cases of this kind do not require reflective thinking; they are disposed of by habit. And of course by far the larger proportion of situations to which the answer seems clear never go to court at all unless the facts are in dispute.

Thurman Arnold and Jerome Frank they could easily have turned their attention to those institutional factors which condition judicial decision-making. For example, their erstwhile Columbia colleague, Underhill Moore, harnessed the natural science model of jurisprudence to identify some of the environmental variables which affect the outcome of the decision-making process.⁶⁶ Nevertheless, Cook and Yntema proved to be strangely reluctant to tread any path which might require them to apply scientific method to the analysis of the operation of appellate courts.

Their treatment of the trial process is open to similar criticism — although it must be said in fairness that this was an area which the two scholars dealt with only tangentially. Perhaps the major flaw in their description of the trial process as being dominated by the force of “habit” was the failure to consider the effect of the personality of the trial judge either upon his determination of “the facts” in a case where they are in dispute or upon his perception of the “relevant” facts in a case where the litigants are in substantial agreement as to “what happened”. As Jerome Frank has so vividly demonstrated, the trial judge may well manipulate his findings of fact so as to disguise “unusual” cases as “routine” or *vice versa* where he feels that the “justice” of the case so merits such a course of action — and he may do this either consciously or unconsciously.⁶⁷

The only plausible conclusion to be drawn from the analysis propounded by Cook and Yntema is that neither of the two scholars was particularly concerned with the task of examining the factors which actually condition authoritative decision-making. When they attacked the contention that legal rules and principles control judicial decisions they cannot be considered as having attempted to substitute a scientifically based model of the decision-making process. On the contrary, when they boldly identified the judges’ conception of economic and social policy as the decisive element in the process, they were really attempting to persuade the judiciary to bare their perspectives in a frank manner so that a critical assessment of the policy implications might be undertaken. Exactly how these perspectives were moulded and how environmental

66. See, e.g., Moore and Hope, *An Institutional Approach to the Law of Commercial Banking* (1929), 38 Yale L.J. 703; Moore and Sussman, *Legal and Institutional Methods Applied to the Debiting of Direct Discounts* (1931), 40 Yale L.J. 381, 555, 752, 928, 1055, 1219; Moore, Sussman, and Brand, *Legal and Institutional Methods Applied to the Debiting of Direct Discounts* (1931), 40 Yale L.J. 817, 1198

67. See, Frank, *Courts on Trial* (Atheneum, 1969 ed.) at 168

variables triggered particular courses of action was of little concern to them as jurists. Ironically, by terminating all inquiry into the operation of the decision-making process with the mere mention of the word "policy", Cook and Yntema in effect replaced one sacred cow of jurisprudence — the authoritative legal rule — with their own quasi-mystical concept of "policy": in any event, each device operated with equal efficiency to forestall genuine examination of judicial behavior.

At first sight, it appears that Herman Oliphant made a valiant attempt to develop a conceptual model of the decision-making process. Indeed, his stimulus-response analysis suggests that he was more than willing to follow the lead of Underhill Moore in applying the principles of behavioristic psychology to the judicial process. In *A Return to Stare Decisis*, he boldly argued that

The predictable element in it all is what courts have done in response to the stimuli of the facts of the concrete cases before them. Not the judges' opinions, but which way they decide cases, will be the dominant subject-matter of any truly scientific study of law The response of their intuition of experience to the stimulus of human situations is the subject-matter having that constancy and objectivity necessary for truly scientific study.⁶⁸

However, when Oliphant's analysis is probed a little more deeply, it soon becomes evident that his adoption of the stimulus-response terminology cannot be treated as a genuine attempt to apply learning theory to the behavior of judges; indeed, such familiar concepts as drive, cue, and reinforcement are all conspicuously absent from Oliphant's exposition. His ingenuous analysis focussed exclusively upon the stimulus of "the facts" of a case; quite why he ignored all other stimuli, such as the influence of oral and written argument, is not even explained let alone justified. Furthermore, Oliphant appears to have contended that "the facts" which are to be treated as the sole object of study are those facts which happen to be included in the case record;⁶⁹ the naive assumption that other background facts which are not recorded are totally devoid of any influence upon the course of judicial decision-making surely deprives Oliphant's analysis of any shred of

68. *Supra*, note 48 at 225

69. This interpretation is also made by Patterson in his *Jurisprudence: Men and Ideas of the Law*, *supra*, note 50 at 314 n. Oliphant's approach differs markedly from that maintained by Underhill Moore who analysed the factual background of cases without reference to the case-records. See, Moore and Sussman, *Legal and Institutional Methods Applied to the Debiting of Direct Discounts*, *supra*, note 66

scientific plausibility.

Similar difficulties abound when an examination is made of the sole "response" which concerned Oliphant. In focussing upon "what the courts have done in response to the stimuli of the facts" Oliphant naturally ignored the response of the judicial opinion: his reasons for dismissing this facet of judicial decision-making have already been discussed. However, in conceptual terms it is difficult to grasp what Oliphant meant when he said that the jurists must concentrate upon "what the courts have done"; this is a phrase which is riddled with ambiguity. As Harold Reuschlein has pointed out

True, in a comparatively small number of single cases, it is doubtless possible to do a pretty good job of guessing at what the judge believed to be the fact and therefore to successfully guess what fact he was really passing upon. Ordinarily, however, one cannot know what the judge really decided except in the sense that he handed down a judgment for Jones or gave Smith a ten-year prison term, or enjoined Dooley from interfering with Brown because there are so many different factors in the evidence which unite to direct the judge's mind to a decision.⁷⁰

It is significant that modern quantitative analysts of the judicial process have avoided the gross ambiguity inherent in Oliphant's thesis and have instead operationalized the judicial "response" in terms of individual votes for or against the values defined by particular legal norms.⁷¹

Curiously enough, Oliphant let the cat out of the bag when he stated what he believed to be the decisive force which ultimately shaped the nature of the judicial response to "the facts". In his view, this force was the 'judges' "intuition" of what was a fair solution to the problem at hand:

Judges are men, and men respond to human situations. When the facts stimulating them to the action taken are studied from a particular and a current point of view, which our present classification prevents, we acquire a new faith in stare decisis. From this view point we see that courts are dominantly coerced, not by the essays of their predecessors, but by a surer thing, by an intuition of fitness of solution to problem, and a renewed confidence in judicial government is engendered.⁷²

70. H. G. Reuschlein, *Jurisprudence — Its American Prophets* (Indianapolis: Bobbs-Merrill, 1951) at 283-84

71. See Schubert, ed., *Judicial Behaviour: A Reader in Theory and Research* (Chicago: Rand McNally and Co., 1964) at 443-460

72. *Supra*, note 48 at 225-226

It is indeed ironic that a jurisprude who so sedulously cultivated the image of a hard-boiled pragmatic scientist should have constructed an explanation of judicial decision-making in terms of a vacuous concept which almost rivals the *Volkgeist* in its metaphysical mystique. It is equally surprising that Oliphant should have manifested such faith in the judicial fraternity when he had devoted so much of his work to the criticism of judicial opinions.⁷³ In the final analysis, Oliphant's stimulus-response approach cannot be taken as a serious application of behavioral psychology to the decision-making process. Despite his radical terminology, Oliphant ultimately propounded a thesis which corresponds pretty closely to the rather traditional approach of Karl Llewellyn's *The Common Law Tradition*; indeed, the parallels between Llewellyn's "immanent law" and Oliphant's "intuition of fitness" are most striking.⁷⁴ When it is stripped of its behavioral rhetoric, Oliphant's analysis ultimately boils down to the fundamental realist message that decisions must be classified according to their factual background rather than in terms of the doctrine which justifies them.

(v) *The Projection of Future Trends in Decision*

As practicing lawyers we are interested in knowing how certain officials of society—judges, legislators, and others — have behaved in the past, in order that we may have a prediction of their probable behavior in the future.⁷⁵

In so far as Cook, Oliphant, and Yntema made little attempt to analyse the factors conditioning judicial decision-making, it is scarcely surprising that they also failed to undertake any systematic approach to the task of predicting future trends in decision. Like Llewellyn, they clearly indicated that an analysis of past trends in decision in terms of 'situation-types' can be a most valuable tool in the prediction of judicial decisions. However, this technique was obviously limited to those cases where there was no significantly "new" element in the problems presented to the court. In order to determine whether an appellate court will perceive the existence of

73. For a discussion of the ethical implications of the "intuitionist" approach in legal realism, see, W. L. Morison, *Frames of Reference for Legal Ideals* (1975), 2 Dal. L. J. 3

74. Llewellyn, *The Common Law Tradition* (Boston: Little, Brown, & Co., 1960) at 127. There is also a parallel to be drawn between Llewellyn's belief that an analysis of background facts would restore faith in the "reckonability" of decision-making and Oliphant's views in *A Return to Stare Decisis*, *supra*, note 48

75. *Supra*, note 29 at 29

such a 'new' element and what its response will be in such circumstances requires a systematic analysis of considerably more than past trends in judicial decision-making.

Modern quantitative analysts of judicial behavior have indicated the type of approach to the predictive task which will yield more fruitful results.⁷⁶ Glendon Schubert, for example, has demonstrated the extent to which a knowledge of individual judge's attitudes may lead to tolerably accurate predictions of their votes on critical issues of policy. In outlining his psychometric model of the decision-making process in the United States Supreme Court, Schubert bestows empirical hands and feet upon the policy analysis urged by Cook and Yntema.

The processes employed for the selection of Supreme Court justices are such that it is reasonable to assume that each justice either comes to the Court with, or soon acquires as the result of the kind of task with which he is charged, relatively well-structured attitudes towards the recurrent major issues of public policy that confront the Court for decision. On the basis of an analysis of their content, it is possible to identify the common issues, and the relevant attitudinal dimensions that are functions of these issues. This content analysis provides the basis for systematic discussion of the set of attitudinal dimensions that is most important for a series of subsets consisting of the justices who comprise the Court at any particular time, even if there is considerable individual variation in the direction and intensity of judicial attitudes, as these are measured on the relevant dimensions over an extended period of time characteristically the effect of what are called "the facts" of the case is to provide direction and intensity in defining the nature of the issue; that is, the issue specifies which attitudinal dimension (or dimensions) is (or are) relevant, while the facts determine where a particular case is located on the dimensions.⁷⁷

76. See, e.g., J. B. Grossman and J. Tanenhaus, eds., *Frontiers of Judicial Research* (New York: John Wiley 1969); W. F. Grunbaum and A. Newhouse, *Quantitative Analysis of Judicial Decisions: Some Problems in Prediction* (1965), 3 *Houston L. Rev.* 201; Schubert, ed., *Judicial Decision-Making* (New York: The Free Press of Glencoe, 1963); Note Schubert, *Prediction from a Psychometric Model* at 548; Schubert, *supra*, note 71; Schubert and Danelski, *Comparative Judicial Decision-Making: Cross Cultural Studies in Political Decision-Making in the East and West* (New York: Oxford Univ. Press, 1969). For a skeptical critique of Schubert's methodology, see, Slayton, *A Critical Comment on Scalogram Analysis of Supreme Court of Canada Cases* (1971), 21 *Univ. of Toronto L.J.* 391; *Quantitative Methods and Supreme Court Cases* (1972), 10 *Osgoode Hall L.J.* 429.

77. Schubert, *The Judicial Mind: The Attitudes and Ideologies of Supreme Court Justices 1946-1963* (Evanston: Northwestern Univ. Press, 1965) at 37-38

Other quantitative analysts have attempted to operationalize the type of fact analysis advocated by Oliphant. The first such analyst, of course, was Underhill Moore who endeavored to identify a correlation between the outcome of judicial decisions and the degree to which 'the facts' of any given case deviate from commercial practice. Modern analysts — such as Kort, Lawlor, and Ulmer have taken advantage of the significant developments in computer technology to evolve more sophisticated mathematical models of prediction.⁷⁸ However, it has been argued that the type of fact analysis which Oliphant tentatively suggested is in any event doomed to ultimate failure because such an approach ignores the critical impact of judicial attitudes upon the *perception* of "the facts" presented to a court. For example, Schubert argues that

So far as we are aware, neither Kort nor Lawlor nor anyone else has yet explained how or why it is possible for "facts" to determine or control the decisions of judges — or of any other human beings On the basis of various assertions — many of them in conflict — about the empirical events of the trial, an appellate court judge makes an inference about what he believes he ought to believe to have occurred The appellate court judge's inference will be a function, inescapably, of his own attitude toward the value he selects as the criterion for perception of the fact. No set of appellate judges is exposed to the same information about any case each approaches the task of inference with a different set of values and attitudes. It is easy to see why appellate judges disagree about what are the "facts" in a case, as well as about what is the "law" In the Supreme Court, facts are judicial perceptions of empirical events; and it is the perceptions not the events themselves, that influence judicial decisions.⁷⁹

78. See, e.g., Fred Kort — *Predicting Supreme Court Decisions Mathematically: A Quantitative Analysis of the Right to Counsel' Cases* (1957), 51 Am. Pol. Sc. Rev. 1; "Content Analysis of Judicial Opinions and Rules of Law" in Schubert, ed., *Judicial Decision-Making*, *supra*, note 76 at 133; *Simultaneous Equations and Boolean Algebra in the Analysis of Judicial Decisions* (1963), 28 Law and Contemporary Problems 164; R. Lawlor, *What Computers Can Do: Analysis and Prediction of Judicial Decisions* (1963), 49 A.B.A.J. 337; S.S. Ulmer, *Quantitative Analysis of Judicial Processes: Some Practical and Theoretical Applications* (1963), 28 Law and Contemporary Problems 164; "Mathematical Models for Predicting Judicial Behaviour" in Bern, ed., *Mathematical Applications in Political Science III* (Charlottesville: Univ. of Virginia Press, 1967) at 67; "The Discriminant Function and A Theoretical Context for its Use in Estimating The Votes of Judges" in Grossman and Tanenhaus, eds., *Frontiers of Judicial Research*, *supra*, note 76 at 335. See also W. F. Grunbaum, *Search Criteria as Boolean Functions* (1966), 8 Journal of Jurimetrics 86; S. Nagel, *Applying Case Analysis to Case Prediction* (1964), 42 Texas L. Rev. 1006

79. *Supra*, note 71 at 451-52

In response to such criticism, some scholars have now developed predictive models which incorporate both attitudinal and "fact" or "*stare decisis*" considerations.⁸⁰ Naturally, it would be unreasonable to expect that Cook, Oliphant, and Yntema should have developed such sophisticated models for the prediction of judicial decisions as those employed by modern behavioral scientists; indeed the models constructed during the course of the last two decades have very definitely been the creatures of modern computer technology. However, it is exceedingly strange that three scholars who both recognized the importance of the predictive task and advocated the development of empirical science should have failed to explore the possibilities of even the most rudimentary systematic analysis of judicial decision-making. Certainly, there is no conceivable reason why they could not have undertaken a systematic survey of past judicial decisions as the first step towards the achievement of predictive capability. In the final analysis, one is confronted by the very same paradox which runs right through the work of Cook, Oliphant, and Yntema: all three devoted massive energies to the realist campaign for an empirical science about law but left no substantial research or serviceable techniques to jurisprudential posterity.

80. See, e.g. W. F. Grunbaum, "Analytical and Simulation Models for Explaining Judicial Decision-Making" in Grossman and Tanenhaus, *supra*, note 76 at 307.